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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

OWEN DIAZ,
 Plaintiff,
 v.
 TESLA, INC. dba TESLA MOTORS, INC.;
 Defendant.

Case No. 3:17-cv-06748-WHO

**PLAINTIFF'S OBJECTIONS TO
 TESLA'S OPENING STATEMENT**

Trial Date: March 27, 2023
 Complaint filed: October 16, 2017

During Tesla's opening statement, Tesla's counsel repeatedly made two arguments that were contrary to the first jury's verdict and in direct contravention of this Court's pretrial orders. See Dkt. 417 at 4-5 (granting Plaintiff's Motion in Limine "to preclude new argument or testimony inconsistent with the first jury's liability findings"). Plaintiff respectfully requests a curative instruction, to be given to the jury first thing Tuesday morning before the first witness is

called, and requests that the Court order Tesla’s counsel to ensure that all future statements and arguments made to the jury are fully consistent with the first jury’s liability verdict.

1. Counsel argued that the jury should discount Ramon Martinez’s conduct because it is not attributable to Tesla itself. Real Time Transcript at 16:27:44–28:05 (“[W]hat you are here to judge when you hear these things is not whether an individual person did something wrong—I’m telling [you] Martinez did—what you are here to decide is whether *Tesla* did something to fail to deal with this and how that act caused damaged to Diaz.”); *id.* at 16:24:45–50 (“the evidence will show that it was easy years later to say that this was based on race, very easy that’s nobody’s fault but Ramon Martinez”); *id.* at 16:25:38–41 (“You heard about Ramon Martinez, I’m not here to defend Ramon Martinez.”); *id.* at 16:25:43–50 (arguing that “supervisors” reprimanded Martinez, as if Martinez was not himself a supervisor).

This argument is directly contrary to the court’s preliminary jury instructions in at least two distinct and material ways. First, it suggests that the second jury is “here to decide . . . whether Tesla did something to fail to deal with this”—but that is untrue, since the first jury already made that determination. *See, e.g.*, Prelim. Jury Ins. No. 6 (“It has been determined that Tesla failed to take all reasonable steps to prevent harassment based on race.”). Second, and more perniciously, it suggests that Tesla is somehow not responsible for the conduct of Martinez, even though Martinez was a supervisor whose conduct is directly attributable to Tesla as a matter of law – as this Court has squarely held. *See, e.g.*, Prelim. Jury Instruction No. 7 (“It has been established that Mr. Diaz was harmed by Ramon Martinez and that ***Tesla is responsible for that harm*** because Tesla negligently supervised or retained Ramon Martinez.”) (emphasis added); Prelim. Jury Ins. No. 4 (“It has been determined that Mr. Diaz was subjected to a racially hostile work environment by Tesla, and that Ramon Martinez or Robert Hurtado or both were/was his supervisor empowered by Tesla to take tangible employment actions against him.”); *see also* Order on Post-Trial Motions (Dkt. 328) at 40 (finding it relevant for punitive damages that “Martinez, a supervisor,” “carried out acts or threats of violence”).

2. Counsel also improperly argued to the jury that Owen Diaz was not actually harmed by Tesla’s misconduct. *See* Real Time Transcript at 16:32:41–33:00 (“Was Owen Diaz actually damaged by this in a way he can prove to get millions and millions of dollars not hurt but real

1 actual damage?); *id.* at 16:18:24–16:18:36 (“Owen Diaz while frustrated upset hurt by what he
 2 experienced fairly” was “not actually psychologically provably damaged”); *id.* at 16:18:40–52
 3 (raising doubt about whether Tesla’s conduct “cause[d] psychological injury that impacted his
 4 functioning and real damage under our law”); *id.* at 16:29:42–30:10 (“[W]as Owen Diaz while
 5 frustrated upset or hurt by what he experienced not psychologically provably damaged...”); *id.* at
 6 16:33:41–58 (“But he has to prove psychological impairment, injury, not hurt, real proveable
 7 damage...Provable damage is something beyond the harm happening.”); *id.* at 16:34:39–51
 8 (“[H]e has to show and prove that there was a psychological injury that impacted his
 9 functioning”).

10 This argument that the second jury is entitled to determine that Mr. Diaz was not harmed,
 11 or that the only compensable harm is “psychological injury that impacted functioning and real
 12 damage”—whatever that means—is also directly contrary to the Court’s prior orders and
 13 preliminary jury instructions. Order on MILs (Dkt. 417) at 10 (“Tesla is free to argue for a small
 14 or negligible value. But the first jury already established his entitlement to these damages, so that
 15 nominal damages are not appropriate here.”); Prelim. Jury Ins. No. 6 (“Mr. Diaz was harmed” by
 16 Tesla’s failure to prevent harassment); Prelim. Jury Ins. No. 7 (“Ramon Martinez’s unfitness or
 17 incompetence harmed Owen Diaz”); Prelim. Jury Ins. No. 3 (Mr. Diaz was subjected to
 18 unwelcome severe and pervasive racial harassment that he perceived as abusive or hostile).

19 Plaintiff respectfully requests that the Court give a curative instruction to the jury
 20 clarifying that (1) Tesla itself has been found liable to failing to prevent harassment; (2) Tesla
 21 itself has been found responsible for the conduct of Ramon Martinez; (3) it has been determined
 22 that Mr. Diaz *was* harmed by Tesla’s conduct, (4) the governing law is what the Court states in
 23 its instructions, not what counsel represents; and (5) the jury should base its calculation of
 24 compensatory and punitive damages on the evidence presented, not on the arguments of counsel.
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